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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

CHARLES E. JAMES,

Petitioner,

v.

VICTOR HERBERT, Superintendent, Attica Correctional Facility; ELIOT SPITZER, New York State Attorney General,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Second Circuit too narrowly interpret its ability to apply a *per se* rule requiring reversal of a criminal conviction where the defendant is represented at trial by an attorney who is implicated in the same criminal activity for which the defendant is on trial?

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OPINIONS BELOW

The summary order of the United States Court of Appeals was dated February 13, 2003. (App. A) (*James v. Herbert*, No. 02-2389, (2d Cir., Feb. 13, 2003), 57 Fed. Appx. 894, 2003 WL 328803) The memorandum and order of the United States District Court for the Western District of New York was dated May 29, 2002. (App. B)

BASIS FOR JURISDICTION

This is a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit, seeking review of a summary order of that Court dated February 13, 2003. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE

Petitioner, Charles E. James, who is currently incarcerated by the State of New York, brought this action under 28 U.S.C. § 2254, in U.S. District Court for the Western District of New York, alleging, *inter alia,* that his Sixth Amendment right to effective assistance of counsel was violated by virtue of his trial counsel's conflict of interest

arising from the attorney's prosecution for obstruction of justice in connection with Petitioner's arrest. The District Court had jurisdiction over Petitioner's claim pursuant to 28 U.S.C. § 1331.

According to his own testimony, on the night of October 9, 1987, James broke into the home of his estranged wife, confronted his wife and her lover, struck his estranged wife, and engaged in a physical altercation with the lover, during which the lover sustained multiple stab wounds, ultimately resulting in the lover's death. After the incident, James drove to his brother's house and telephoned the attorney who subsequently represented James at trial: Douglas W. Whitney, Esq.

Whitney met James at James' brother's house, where they discussed the situation. Whitney took the weapon from James and placed it in his own car, after which James never saw the knife again. Whitney also instructed James to wash his face and hands, and change his clothing. Whitney told James not to disclose what he had done with the knife and his clothing.

Whitney, James and James' brother then drove to James' house, where James and Whitney were both arrested by Sheriff's Deputies who had responded to a call from James' estranged wife and discovered the victim's body. James was charged with murder; Whitney was charged with obstructing governmental administration.

James was indicted by an Ontario County Grand Jury on seven counts: two counts of murder, three counts of burglary, and two counts of assault. Whitney was prosecuted in Ontario County on the charge of obstructing governmental

administration. The criminal proceeding against Whitney was adjourned from December 1987 until after the conclusion of James' trial.

James, represented by Whitney, was tried by an Ontario County jury in late April, 1988. James complied with Whitney's instructions not to disclose what happened to the weapon and his bloody clothes throughout the course of the proceedings in state court.

During the course of Whitney's representation of James, in New York State Supreme Court, Whitney repeatedly reinforced his instructions to James to say that he had lost the knife at the crime scene, and to not disclose what he had done with his clothing. James took the stand to testify concerning, *inter alia,* his emotional state on the night of the assaults, in an effort to establish a defense of extreme emotional disturbance to the intentional murder charge. Acting on Whitney's advice, James testified falsely concerning his knowledge of the whereabouts of the weapon and the clothing he had been wearing at the time of the assaults.

The jury found James not guilty of intentional murder and one second degree assault charge, but guilty of first degree manslaughter as a lesser included offense, felony murder, three counts of burglary, and two counts of assault, one of which was a lesser included offense of the charged crime. James was sentenced to an indeterminate term of 24 years to life.

The governmental obstruction charge against Whitney was dismissed after a trial. Whitney subsequently commenced a civil action against the Ontario County Sheriff for wrongful

arrest, which was later dismissed for failure to prosecute. *Whitney v. Stewart*, 175 A.D.2d 674, 572 N.Y.S.2d 597 (4th Dept. 1991).

James moved to vacate his conviction in the trial court pursuant to N.Y. Crim Proc. Law §§ 440.10 and 440.20 in May 1994, on the basis, *inter alia*, that Whitney's conflict of interest deprived James of effective representation, both due to Whitney's inability to effectively advise James, and because the fact that James was knowingly and intentionally lying on cross-examination severely undermined James' credibility before the jury. The § 440 motions were denied, and leave to appeal to the Supreme Court Appellate Division was also denied.

James perfected the appeal of his conviction to the Appellate Division in May 1998. The Appellate Division affirmed in December 1998, and leave to appeal to the New York Court of Appeals was denied in March 1999. The instant proceeding was commenced in U.S. District Court in February 2000.

The matter was referred to U.S. Magistrate Judge H. Kenneth Schroeder for a Report and Recommendation. Respondent, represented by the Attorney General of the State of New York, answered the petition. The Magistrate Judge recommended that the petition be denied. Petitioner filed timely objections to the Report and Recommendation, and, after oral argument, District Judge John T. Elfvin overruled the objections, adopted the Report and Recommendation, and dismissed the petition, granting a certificate of appealability solely on the conflict of interest claim.

James appealed to the Court of Appeals for the Second Circuit, arguing that his defense attorney had a *per se* conflict of interest with James resulting from the attorney's involvement in the crime for which James was tried, and that such conflict of interest deprived James of his right to counsel under the Sixth Amendment, thus requiring reversal of James' conviction.

The Court of Appeals noted that "James's ineffective assistance of counsel claim finds arguable support in precedents of this Court." 2003 WL 328803 at *1 (citing *United States v. Fulton,* 5 F.3d 605, 612 (2d Cir. 1993); *United States v. Cancilla,* 725 F.2d 867, 867 (2d Cir. 1984); and *Solina v. United States,* 709 F.2d 160, 161, 168 (2d Cir. 1983)). However, the Court held that the petition was barred by 28 U.S.C. § 2254(d). *Id.* at *2.

Because there is a conflict among the Circuits, and between certain of the Circuits and the Illinois Supreme Court, Petitioner seeks a writ of certiorari to resolve this important matter.

REASONS FOR GRANTING THE PETITION

I. The Sixth Amendment Requires Reversal of a Criminal Conviction Where a Defendant Has Been Denied Effective Assistance of Counsel

Although the general rule requires that a criminal defendant must typically show that defense counsel's deficiencies or errors had an effect on the judgment in order to prevail on a Sixth Amendment claim of ineffective assistance of counsel, this Court has presumed prejudice where a defendant is actually or constructively denied counsel

altogether, or where the State has interfered with counsel's assistance. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *United States v. Cronic,* 466 U.S. 648, 659 (1984)). *See also Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1240-41 (2002) (citing *Cronic, supra*, 466 U.S. at 658-59; *Geders v. United States,* 425 U.S. 80, 91 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963)).

The Court has also found that a "similar, though more limited, presumption of prejudice" is warranted where "counsel is burdened by an actual conflict of interest." *Strickland, supra*, 466 U.S. at 692, (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)).

II. There is a Conflict Among the Circuits as to Whether a *Per Se* Rule Applies Where Defense Counsel is Implicated in Defendant's Crime, and Between the Illinois Supreme Court and Certain Courts of Appeals

The Court of Appeals for the Second Circuit first articulated a *per se* conflict of interest rule in *Solina v. United States,* 709 F.2d 160 (2d Cir. 1983). In that case, the defendant learned after his conviction that his "attorney," although possessed of a law degree, and having substantial legal experience in administrative proceedings was not admitted to the bar of any jurisdiction. Although acknowledging that the representation Solina received was equal to that provided by many licensed attorneys, and further acknowledging that the evidence against Solina was overwhelming, the Court reversed Solina's conviction. *Id.* at 165. Having considered the historical underpinnings of the Sixth Amendment's right to "counsel," the Court held that where an accused is denied his right to counsel, "harmless error" analysis cannot apply, and the conviction must be reversed. *Id.* at 169.

One year later, the Second Circuit Court of Appeals expanded the applicability of the *per se* rule to a case in which one of two co-defendants' counsel was accused of participating in a conspiracy involving a co-conspirator of the defendants' in a scheme similar to the scheme for which the defendants were on trial. *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984). The Court held:

> We conclude with a similar lack of enthusiasm that the principle of *Solina* applies to the personal conflict of interest of Cancilla's trial counsel and requires us to reverse the judgment of the district court. As noted, the government asks us to assume for the purpose of this appeal that Cancilla's trial counsel committed crimes with a possible co-conspirator of Cancilla similar to those for which Cancilla was on trial and that Cancilla was unaware of this. But with the similarity of counsel's criminal activities to Cancilla's schemes and the link between them, it must have occurred to counsel that a vigorous defense might uncover evidence or prompt testimony revealing his own crimes, even more so than in *Solina*. It is noteworthy that Cancilla, on advice of his counsel, chose not to present a defense. Moreover, representation of Cancilla in ways other than by a vigorous defense may have been affected. It is difficult to see how counsel conflicted in this way could impartially have given Cancilla advice on whether or not to take a guilty plea, since counsel might have feared that acceptance of a plea would turn on Cancilla's cooperation, which might lead to discovery of the link to counsel's own activities. In such circumstances, proof of this type of

> conflict, which the government here asks the court to assume, constitutes under *Solina* a per se violation of the Sixth Amendment right to effective assistance of counsel.
>
> * * * *
>
> *What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities*? The government appears to recognize this in describing the rationale of *Solina* as "the danger that the person acting as a lawyer might fear that a vigorous defense might cause the court or the government to inquire into his background and learn of his criminal activity." As indicated above, there were similar, probably greater, dangers here because the very evidence at trial or in plea negotiations might well lead to discovery of the attorney's prior criminal activity.

Id. at 870 (emphasis added).

The Court of Appeals for the Second Circuit has applied the *per se* rule infrequently on subsequent occasions, and only where it found "egregious conduct" such as in *Solina* and *Cancilla. See also United States v. Arrington*, 867 F.2d 122 (2d Cir. 1989); *United States v. Fulton,* 5 F.3d 605 (2d Cir. 1993); *Armienti v. United States*, 234 F.3d 820 (2d Cir. 2000).

Like the Court of Appeals for the Second Circuit, the Supreme Court of Illinois applies a *per se* standard to attorney conflict of interest cases. *Duncan v. O'Leary*, 806 F.2d 1307, 1313 (7th Cir. 1986) (citing *People v. Washington*, 101 Ill.2d

104, 77 Ill.Dec. 770, 461 N.E.2d 393 (1984), *cert. denied*, 469 U.S. 1022; *People v. Cunningham*, 107 Ill.2d 143, 89 Ill. Dec. 879, 481 N.E.2d 722 (1985)).

However, the Seventh Circuit Court of Appeals, has explicitly rejected a *per se* rule, *Id.*, as have the Sixth Circuit Court of Appeals, *Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993); and the Ninth Circuit Court of Appeals, *United States v. Mouzin*, 785 F.2d 682, 697-99 (9th Cir. 1986).

The Court of Appeals for the Third Circuit has held that, "[I]n certain sixth amendment contexts, prejudice is presumed from the circumstances." *Gov't of the Virgin Islands v. Zepp*, 748 F.2d 125, 132 (3d Cir. 1984) (referencing *Strickland v. Washington*, 466 U.S. 668(1984)). The Court further held that "[I]n order for the defendant to make out a violation of her sixth amendment rights, she must establish that an actual conflict of interest adversely affected counsel's performance but she need not demonstrate actual prejudice" *Id.* at 134.

The Fifth Circuit Court of Appeals has articulated a "policy to preserve the integrity of the judicial system" *United States v. Greig* 967 F.2d 1018, 1023-24 (5th Cir. 1991), pursuant to which it has reversed convictions where defense counsel participated in his clients' escape from jail. *Id.* (citing *United States v. White,* 706 F.2d 506 (5th Cir. 1983); *United States v. Snyder*, 707 F.2d 139 (5th Cir. 1983)). The Court of Appeals remanded Greig for a new trial because of "the district court's failure to hold a [*United States v.*] *Garcia*[, 517 F.2d 272 (5th Cir. 1975)] hearing after learning counsel had an actual conflict of interest, which later adversely affected his performance." *Id.*

The Court of Appeals for the Sixth Circuit has previously "specifically . . . rejected a *per se* rule as to conflicts of interest and requires proof of an actual conflict." *Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993) (citing *Thomas v. Foltz*, 818 F.2d 476, 480-81 (6th Cir.), *cert. denied*, 484 U.S. 870 (1987)). However, when confronted with a request to apply a *per se* rule to a situation in which defendant's counsel was indicted on a drug charge three weeks after defendant's arraignment, and took a plea approximately one month after defendant's guilty verdict, but before sentencing, the Court held:

> Because the question of whether the *Sullivan's* lessened standard of proof for a claim of ineffective assistance of counsel based upon an attorney's conflict of interest for anything other than joint representation remains an "open question" in the jurisprudence of the Supreme Court, and in fact was an open question at the time Petitioner's case was heard, Petitioner's claim fails because it is not based upon clearly established Supreme Court precedent as mandated by AEDPA.

Smith v. Hofbauer, 312 F.3d 809, 817 (6th Cir. 2002) (citing *Mickens*, *supra*, 122 S. Ct. at 1246).

The dissenting judge argued that the case should have been remanded to the district court for an evidentiary hearing:

> Supreme Court decisions clearly established long ago that a person ". . . charged with crime . . . requires the guiding hand of counsel at *every step in the proceedings against him*", and that the "right to counsel is the right to the effective

assistance of counsel". It is also clear that the right to effective assistance of counsel applies at the plea stage of the proceedings. "[E]ven when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." Finally, highly relevant to the circumstances here, Supreme Court decisions teach that "an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."

* * * *

Obviously, *Cuyler* is clearly established and relevant Supreme Court law. But it is not the totality of it. The reality is that conflicts come in all shapes and sizes, only one of which is joint representation. In my view, and critical to my analysis of the present case, the Supreme Court's decision in *Holloway* clearly established the ultimate, functionally governing, legal rationale for federal habeas review for any convicted defendant represented in state court by conflicted counsel, not merely joint representation. As the Court explained there, "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [T]he evil is in what the advocate finds himself compelled to *refrain* from doing, not only at trial, but also as to possible pretrial plea negotiations and in the sentencing process."

> The foregoing considered, I believe that, even though Balgooyen's conflict is not on "all fours" with the joint representation at issue in *Cuyler*, it is even more "suspect." It had a stronger tendency to influence, if not compel, him to refrain from actions potentially advantageous to his client that an effective counsel would take. That tendency should have aroused the District Court's serious suspicions and prompted it to examine the entire state court record with heightened scrutiny.

Id. 824-25 (citations omitted).

In a recent pre-*Mickens* decision, the Court of Appeals for the Eighth Circuit, argued for a limitation of *Cuyler*'s "almost *per se* rule of prejudice" to cases where there is a conflict between codefendants or serial defendants that was not brought to the attention of the trial court. *Caban v. United States*, 281 F.3d 778, 781-82 (8th Cir. 2002). Notwithstanding its holding that a conflict of interest between a defendant and another client of the defendant's attorney did not violate the defendant's right to counsel, *Id.* 785-86, the Court acknowledged that:

> where the trial court is made aware of a potential conflict of interest before, during, or in some instances, after trial . . . the trial court has a duty to conduct a searching inquiry into the possibility of a constitutional violation arising from that conflict. Failure to undertake this inquiry mandates an automatic reversal of any conviction "upon a showing of possible prejudice." This per se rule of reversal applies regardless of the nature of the conflict.

Id. at 781 (citing *Atley v. Ault*, 191 F.3d 865, 873 (8th Cir. 1999)) (other citations omitted).

The Ninth Circuit Court of Appeals has held in the context of a multiple representation case that:

> A criminal defendant's Sixth Amendment right to counsel includes the right to be represented by an attorney with undivided loyalty. This guarantee is so important that, unlike with other Sixth Amendment claims, when a defendant alleges an unconstitutional actual conflict of interest, "prejudice must be presumed," and harmless error analysis does not apply.

Lockhart v. Terhune, 250 F.2d 1223, 1226 (9th Cir. 2001). In *Lockhart*, the Court noted that because the petitioner raised the conflict of interest for the first time on appeal, he was required to "demonstrate that an actual conflict adversely affected his lawyer's performance." *Id.* at 1230. The Court also held:

> Lockhart identifies a number of actions and inactions that adversely affected his defense and that "likely" can be attributed to Hove's conflict of interest. . . . Because of the conflict of interest, however, Hove was unable to exploit this defense fully. We can discern no tactical justification for Hove's decisions and, therefore, conclude that he was likely motivated by a desire to protect his other client. This is sufficient to satisfy the "adverse effect" prong of the conflict of interest test. The state appellate court's decision that Lockhart did not meet his burden was contrary to clearly established federal law.

Id. at 1231-32 (citations omitted).

In *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001), the defendant argued that one of his trial attorneys labored under a conflict of interest by continuing to represent him when there was a possibility that the attorney was under investigation by the prosecutor in connection with a different case. The Court of Appeals for the Eleventh Circuit, noting that the rule of that Circuit involved an application of the *Cuyler* two-part test, *Id.* at 1010 (citing *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (en banc)), held that "even if we assume that an actual conflict of interest existed between Cuni and his attorney, we agree with the district court's alternative holding that Cuni has not, and cannot, show his attorney's performance was "adversely affected" by the conflict." *Id.* at 1011.

The District of Columbia Circuit has applied a *per se* rule, but only to cases where a defendant is represented by a person never properly admitted to any bar. *United States v. Mitchell*, 216 F.3d 1126 (D.C. Cir. 2000).

III. Most Circuit Courts That Have Considered a Case in Which a Criminal Defendant's Attorney Faces Charges Relating to the Same Crime for Which Defendant Faces Trial Have Found that the Defendant Was Denied Counsel Within the Meaning of the Sixth Amendment

In only a very small number of reported cases from the Courts of Appeals has the precise factual pattern presented in this case been at issue: a defendant is represented by an attorney who faces criminal or disciplinary proceedings for conduct directly related to the crime for which the defendant is on trial. In nearly all the reported cases, the Courts have determined that there was an unwaivable conflict between the defendant and the attorney. *United States v. Salinas*,

618 F.2d 10092 (5th Cir. 1980) (affirming trial judge's order disqualifying attorney who was "target" of investigation concerning events for which client was indicted); *Cancilla, supra* (defense counsel may have conspired with participant in defendant's scheme on similar fraudulent insurance claims involving cars owned by the lawyer); *Zepp*, *supra*, (counsel was accused of concealing evidence of defendant's crime); *Greig*, *supra*, (defendant's attorney attempted to influence a co-defendant represented by other counsel to refuse a guilty plea).

In two of the cases where the Court refused to find a Sixth Amendment violation, the defendants were also represented by additional counsel, *United States v. Marcano-Garcia*, 622 F.2d 12 (1st Cir. 1980); or counsel had already been tried, convicted and served time. *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995). Where the defense attorneys, although subjects of an investigation concerning theft of evidence, were unaware of the investigation, and were subsequently found not to have stolen the documents, a Court of Appeals has found that there was no conflict of interest. *United States v. Knight*, 680 F.2d 470 (6th Cir. 1982).

In *United States v. Wallace*, 276 F.3d 360 (7th Cir. 2002), the government successfully moved to disqualify defense counsel on the ground that counsel had attempted to suborn perjury in preparation for sentencing hearing. *Id.* at 364. Although relying on its prior holdings in *Cerro v. United States*, 872 F.2d 780 (7th Cir. 1989) and *United States v. Montana*, 199 F.3d 947 (7th Cir. 1989) for the proposition that the *Cancilla per se* rule does not apply in the Seventh Circuit, the Court acknowledged that, "If the trial judge knew or should have known that a potential conflict of interest

existed and did not adequately address the issue with the defendant, then we will presume prejudice." *Id.* at 366-67 (citing *Lipson v. United States*, 233 F.3d 942, 945 (7th Cir. 2000).

Thus, notwithstanding several Circuits' articulated rejection of a *per se* rule requiring automatic reversal, it appears that most of the Circuits that have considered claimed Sixth Amendment violations similar to Petitioner's have, in fact, treated the situations as demonstrating a *per se*, unwaivable violation of the Sixth Amendment.

CONCLUSION

This petition presents an important question concerning the integrity of the criminal process that has been decided in conflicting ways by several of the Circuit Courts of Appeals. Petitioner respectfully requests this Court to grant certiorari in order to resolve this significant issue relating to a criminal defendant's right to the unwavering loyalty of his or her defense attorney.

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED FEBRUARY 13, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of Feb., two thousand three.

PRESENT: HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR,
Circuit Judges.

02-2389

CHARLES E. JAMES,

Petitioner-Appellant,

-v.-

VICTOR HERBERT, Superintendent, Attica Correctional Facility; ELIOT SPITZER, New York State Attorney General,

Respondents-Appellees.

Appendix A

Appeal from the United States District Court for the Western District of New York (Elfvin, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court be **AFFIRMED**.

Petitioner-appellant Charles E. James appeals from a judgment entered in the United States District Court for the Western District of New York (Elfvin, *J.*) on May 30, 2002, denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. James is currently serving a sentence for his 1988 conviction in New York state court on counts of first-degree manslaughter, second-degree (felony) murder, burglary, and assault. On appeal, as in the district court, James argues that his trial counsel had a *per se* conflict of interest that violated his Sixth Amendment right to effective assistance of counsel because his lawyer concealed evidence of James's crime, instructed James to lie to authorities, was arrested for interfering with James's arrest, and eventually faced prosecution for obstruction.[1]

This Court reviews *de novo* the denial of a petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See Ryan v. Miller*, 303 F.3d 231, 245 (2d Cir. 2002). We review the district court's factual findings for clear error. *See Morris v. Reynolds*, 264 F.3d 38, 45 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 2381(2002).

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1. James asserted other claims in the district court, but the court granted a certificate of appealability "solely on his conflict of interest claim." Judgment in a Civil Case, dated May 30, 2002.

Appendix A

1. James's ineffective assistance of counsel claim finds arguable support in precedents of this Court. *See, e.g., United States v. Fulton*, 5 F.3d 605, 612 (2d Cir. 1993) (holding that a cooperating co-defendant's "allegations that lead trial counsel was engaged with him in heroin trafficking created an actual conflict of interest of the sort that requires application of the *per se* rule"); *United States v. Cancilla*, 725 F.2d 867, 867 (2d Cir. 1984) (recognizing a *per se* conflict of interest where there is evidence that "counsel had himself engaged in criminal activity related to the conduct for which defendant was convicted"); *Solina v. United States*, 709 F.2d 160, 161, 168 (2d Cir. 1983) (recognizing a *per se* conflict of interest where a defendant was represented at trial by a person not admitted to the bar).

2. However, where a habeas petitioner's claim has been "adjudicated on the merits in State court proceedings," our review is circumscribed:

> An application . . . shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). James asserted his ineffective assistance claim in a § 440 motion for post-conviction relief, which the state court denied; the Appellate Division denied leave to appeal.

3. James can rely on none of the exceptions of 28 U.S.C. § 2254(d). First, James does not contend that the state court denied his claim based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

Second, the state court ruling did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States.*" 28 U.S.C. § 2254(d)(1) (emphasis added); *see also Gilchrist v. O'Keefe*, 260 F.3d 87, 93 (2d Cir. 2001) (defining "clearly established Federal law" as " 'the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision' ") (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)), *cert. denied*, 122 S. Ct. 1933 (2002). No Supreme Court holding has recognized the particular claim James asserts; the Supreme Court has identified only one circumstance as constituting a *per se* conflict of interest: compelled representation of multiple defendants with divergent interests. *See Holloway v. Arkansas*, 435 U.S. 475, 484-91 (1978). Nor can James establish that the state court "unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to [a] situation[ ] which that principle should have, in reason, governed." *Kennaugh v. Miller*, 289 F.3d 36, 45 (2d Cir.), *cert. denied*, 123 S.Ct. 251 (2002). At least one circuit has expressly declined to follow the rule we announced in *Cancilla* and related cases. *See United States v. Wallace*, 276 F.3d 360, 368 (7th Cir.) (noting Seventh Circuit's rejection of *Cancilla*' s *per se* rule), *cert. denied*, 122 S. Ct. 2592 (2002).

Appendix A

In *Mickens v. Taylor*, 122 S. Ct. 1237 (2002), the Supreme Court recently declined to recognize a *per se* conflict of interest where a defendant who was tried and convicted for murder was represented at trial by a lawyer who had previously represented the murder victim. *Id.* at 1245. The Court observed that it has so far declined to extend *Holloway*'s *per se* rule to other circumstances. *Id.* at 1242. The Court noted that *Holloway* "stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice," *id.* at 1245, and it questioned whether actual conflicts of interest—let alone *per se* conflicts—exist in various contexts in which circuit courts have identified them. *Id.* (citing cases). Thus, *Cancilla* notwithstanding, and however much we might wish to encourage the state courts to follow *Cancilla*, they were not *required* to extend the Supreme Court's *per se* rule to James's situation.[2]

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:
s/ Lucille Carr
Lucille Carr, Deputy Clerk

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2. James does not argue that it would be an unreasonable application of clearly established Supreme Court precedent to refuse to apply the "actual conflict" standard set forth in *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), to the circumstances of this case, and we express no view on that question.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED MAY 29, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

00-CV-0171E(Sr)

CHARLES E. JAMES,

Petitioner,

-vs-

VICTOR HERBERT, Superintendent, Attica Correctional Facility, and ELIOT SPITZER, New York State Attorney General,

Respondents.

MEMORANDUM and ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 February 22, 2000 alleging that his conviction had been obtained in violation of his Sixth Amendment right to the effective assistance of counsel. On April 10, 2000 the undersigned referred the petition to then Magistrate Judge Carol E. Heckman for consideration and a Report and Recommendation ("R&R"). Such referral was transferred to Magistrate Judge H. Kenneth Schroeder, Jr. pursuant to a June 1, 2000 Order of Chief Judge David G. Larimer following judge Heckman's resignation April 31,

2000. Judge Schroeder filed his R&R May 17, 2001 recommending that the petition be denied. Petitioner filed objections to the R&R May 29, 2001. Oral argument thereupon was had July 20, 2001 and the matter has thereafter been before the undersigned for disposition.

On October 9, 1987 petitioner had gone to the townhouse of his estranged wife Jane James ("Jane") and, after determining that Anthony Cardulla — with whom he knew her to be having an affair — was inside of the house with her, had broken into her house by throwing a clay flower pot through a sliding glass door. Once inside he had observed Jane wearing nothing but a bra and panties, whereupon he had knocked her to the floor. Petitioner then had taken out a knife and advanced towards Cardulla who was standing on the stairs in his underwear. Jane then had fled to a neighbor's house and called the police while petitioner stabbed Cardulla multiple times causing his death.

Petitioner then had driven to his brother Robert's house and had called Robert's attorney Douglas W. Whitney, Esq. Whitney came to Robert's house and, after speaking to petitioner, arranged for him to surrender himself to the Ontario County Sheriff's Office. However, instead of proceeding directly to the Ontario County Sheriff's Office, petitioner, Robert and Whitney had proceeded to petitioner's house. Petitioner was arrested in his driveway by Ontario County Sheriff's deputies who had responded to Jane's call and discovered Cardulla's body. Whitney was also arrested and charged with obstructing governmental administration.

Appendix B

Petitioner was subsequently charged with seven counts in Ontario County Grand Jury Indictment Number 87-10-222 — *viz.*, (1) second degree murder in violation of N.Y Penal Law §125.25(1)[1] (intentional murder), (2) second degree murder in violation of N.Y Penal Law §125.25(3) (murder while committing a burglary), (3) first degree burglary in violation of N.Y Penal Law §140.30(2) (physical injury to non-participant in the burglary), (4) first degree burglary in violation of N.Y Penal Law §140.30(3) (use of dangerous weapon while committing a burglary), (5) second degree burglary in violation of N.Y. Penal Law §140.25(2) (entering a dwelling), (6) second degree assault in violation of N.Y. Penal Law §120.05(1) (intentionally causing serious physical injury) and (7) second degree assault in violation of N.Y. Penal Law 5120.05(6) (causing physical injury during felony). A jury trial was held in the Ontario County Court before Judge Frederic T. Henry, Jr. from April 21, 1988 to April 29, 1988 during which petitioner testified in his own defense in an attempt to, *inter alia*, establish the statutory defense of extreme emotional disturbance[2] to the first count of the indictment charging him with intentional murder. At the conclusion of the trial, the jury found petitioner not guilty of intentional murder on count one, but guilty of the lesser included offense of first degree manslaughter in violation of N.Y Penal Law §125.20(2). Petitioner was also found guilty on counts two, three, four, five and seven and

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1. Actually, paragraph 1 of section 125.25. Such is true of the form used in all seven counts.

2. N.Y. Penal Law §125.25(1)(a) holds that justified extreme emotional disturbance is an affirmative defense to a charge of murder in the second degree.

guilty of the lesser included offense of third degree assault in violation of N.Y. Penal Law §120.00(1) on count six. On June 22, 1988 judge Henry sentenced petitioner to an indeterminate sentence of 24 years to life imprisonment.

On May 11, 1994 — *i.e.*, alm ost five years after he had been sentenced — petitioner filed a motion to vacate the conviction and sentence pursuant to N.Y. Crim. Proc. Law §§440.10 and 440.20 on the basis that, *inter alia*, he had received ineffective assistance of counsel because Whitney had had a conflict of interest in that, when Whitney had arrived at Robert's house, Whitney had taken the knife that petitioner had used to stab Cardulla and had put it in the trunk of Whitney's car and had advised petitioner to wash his hands and face and change his clothing, after which Robert had given petitioner some different clothes to wear and had taken the clothes petitioner had been wearing when he had stabbed Cardulla. C. James Mar. 9, 1994 Aff. ¶3. Petitioner states that he does not know what had subsequently became of the knife and the clothing. *Ibid.* Petitioner alleges that Whitney had then advised him to commit perjury during his trial by falsely testifying that he had lost the knife at the crime scene and not to disclose that he had actually given the knife to Whitney and his clothes to Robert. *Id.* at ¶¶6-7, 9. Petitioner further states that Whitney had been a defendant in a criminal case resulting from his arrest for obstructing governmental administration and had commenced a civil case against, *inter alia*, the Ontario County Sheriff for wrongful arrest.[3] *Id.* at ¶¶4, 8-10. Finally, petitioner alleges that Whitney

3. *See Whitney v. Stewart*, 175 A.D.2d 674 (4th Dep't 1991) (affirming dismissal of wrongful arrest case for failure to timely serve a complaint and noting that "allegations [of] emotional and psychological problems stemming from his arrest and subsequent trial" were not an adequate excuse for such).

had had him sign a document transferring a 60,000 pension fund to him, from which Whitney had paid himself legal fees in excess of $35,000 without specific authorization from petitioner. *Id.* at ¶10. Judge Henry denied petitioner's section 440 motion March 14, 1996. On April 15, 1996 petitioner applied to the New York State Supreme Court, Appellate Division, Fourth Department ("Appellate Division") pursuant to N.Y Crim. Proc. Law §460.15 for leave to appeal judge Henry's denial of his section 440 motion; however, the Appellate Division denied such.

Petitioner perfected his July 20, 1988 notice of appeal to the Appellate Division May 13, 1998,[4] arguing that, *inter alia*, he had received ineffective assistance of counsel due to Whitney's misunderstanding of the defense of extreme emotional disturbance.[5] The Appellate Division unanimously affirmed petitioner's conviction December 31, 1998, holding:

> "Defendant was not denied effective assistance of counsel as a result of defense counsel's mistaken belief that, if the jury believed that defendant was acting under extreme emotional disturbance, defendant could be acquitted of count one of the indictment, charging intentional murder, rather than convicted of manslaughter in the first degree under that count. Defendant failed to establish

4. The reason for the almost decade-long delay in the appeal is not discernible from the state court records.

5. The issue of Whitney's alleged conflict of interest was not raised on appeal because the Appellate Division had denied leave to do so.

> actual prejudice as a result of defense counsel's misunderstanding (*cf.*, *People v. Daley*, 172 A.D.2d 619, 621), and we conclude that, on the whole, defendant received meaningful representation (*see*, *People v. Rivera*, 71 NY2d 705, 708-709)." *People v. James*, 256 A.D.2d 1149 (4th Dep't 1998).

Petitioner applied for, but was denied leave to appeal to the New York Court of Appeals March 23, 1999. *People v. James*, 93 N.Y.2d 875 (1999). Petitioner subsequently commenced the present proceeding seeking a writ of habeas corpus.

Petitioner's first claim is that he received ineffective assistance of counsel because Whitney had been unfamiliar with criminal law and mistakenly believed that, by establishing the defense of extreme emotional disturbance, petitioner would be acquitted of count one of the indictment which charged him with intentional murder, rather than simply reducing such count to the lesser included offense of first degree manslaughter. Petitioner alleges that he was prejudiced as a result of Whitney's misunderstanding of such defense in two ways — *viz.*, (1) because Whitney called petitioner to the stand where he "admitted all the necessary elements of both burglary and felony murder" and (2) did not explore the possibility of a plea bargain. Pet. at ¶¶20-30, 32-33, 38-39, 43-44.

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction *** has two components. First, the defendant must show that counsel's performance was deficient. This requires showing

> that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In his R&R, Judge Schroeder concluded that he need not consider whether Whitney's representation of petitioner was deficient due to his misunderstanding of the defense of extreme emotional disturbance because petitioner could not show any prejudice resulting therefrom because, due to the

> "overwhelming evidence against [petitioner] presented by the prosecution, the result of the proceeding undoubtedly would have been the same had [petitioner] never taken the stand. Accordingly, the Court finds that [petitioner] cannot show prejudice based on alleged ineffective assistance of counsel, including any misunderstanding of the effect of extreme emotional distress [*sic*] defense his defense counsel may have had." R&R at 9, 13.

Petitioner objects to such portion of the R&R on three grounds — *viz.*, judge Schroeder should have considered

(1) whether Whitney's representation was deficient due to his misunderstanding of the defense of extreme emotional disturbance, (2) whether he was prejudiced by Whitney's misunderstanding of such defense because he admitted the elements of burglary in the witness chair in his attempt to establish such defense thereby ensuring his conviction for burglary and consequently for felony murder and (3) whether he was prejudiced due to Whitney's failure to explore the possibility of a plea bargain. Objections at 2-7.

A careful review of the record reveals that Whitney did not believe that successfully establishing the statutory defense of extreme emotional disturbance precluded conviction of the lesser included defense of first degree manslaughter, but rather that it did not automatically result in a conviction of first degree manslaughter. Tr. VII at 95-101; Tr. VIII at 2-5. Furthermore, the wording of the verdict sheet submitted to the jury[6] actually supported Whitney's "understanding" of

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6. *"COUNT ONE — MURDER, SECOND DEGREE*

With intent to cause death of another, causes such death.

Guilty
or
Not Guilty

If Guilty, consider defense of Extreme Emotional Disturbance which, if sustained, reduces charge to Manslaughter.

If Not Guilty, of principal count, consider Lesser Included Offense of Manslaughter, First Degree — With Intent to cause serious physical injury to another, he causes death of such person.

Guilty
or
Not Guilty

(Cont'd)

the defense of extreme emotional disturbance because it allowed the jury to find petitioner guilty of having committed second degree murder while under extreme emotional disturbance and nonetheless find him not guilty of first degree manslaughter. However, such is irrelevant, because the jury found petitioner not guilty of intentional murder. The jury circled "Not Guilty" in regard to intentional murder and "Guilty" in regard to the lesser included offense of first degree manslaughter.[7]

(Cont'd)

If not Guilty of principal count and above lesser included offense, of Manslaughter, First Degree, consider further Lesser Included Offence of Manslaughter Second Degree — Recklessly causes the death of another person.

Guilty
or
Not Guilty"

7. The genesis of the argument that the jury actually found petitioner guilty of intentional murder and then reduced such to first degree manslaughter appears to he when the court clerk asked the jury what its finding was regarding "murder in the second degree as charged in the first count of the indictment; guilty or not guilty?," and the foreman of the jury inconsistently responded "Guilty, due to extreme emotional disturbance." Tr. VIII at 94. Due to this inconsistency, judge Henry asked the jury foreman

> "I assume, if this is correct, you found him guilty of murder in the second degree?
>
> "THE JURY FOREMAN: Right.
>
> "THE COURT: However, you found he acted under extreme emotional disturbance?

(Cont'd)

Appendix B

To the extent that petitioner argues that he was prejudiced by Whitney's misunderstanding of the defense of extreme emotional disturbance because, in his attempt to establish such defense, he admitted the elements of burglary during his testimony thus ensuring his conviction of felony murder and negating any benefit from the successful establishment of an extreme emotional disturbance defense, such is not borne out by the trial transcript. During his testimony, petitioner consistently denied having an intention to commit a felony inside Jane's townhouse at the time he broke into it, rather arguing that he became enraged when he saw Jane and Cardulla in their underwear after he had entered — Tr. V at 148, 151-153; Tr. VII at 144-145 — and if the jury had believed petitioner's testimony on this subject it would have found him not guilty of burglary and consequently not guilty

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(Cont'd)

"THE JURY FOREMAN: Right.

"THE COURT: Which results in a reduction, a reduced charge or finding of manslaughter, first degree —

"THE JURY FOREMAN: Right.

"THE COURT: (continuing) — is that correct?

"THE JURY FOREMAN: Yes." *Id.* at 96-97.

However, the verdict rendered by the jury cannot be singlehandedly changed by its foreman in response to leading questioning from the trial judge and, as it stands, the jury found that petitioner was found not guilty of intentional murder because he did not intend to kill Cardulla, therefore petitioner could not have suffered any prejudice as a result of Whitney's misunderstanding of the defense of extreme emotional disturbance.

of felony murder. Inasmuch as petitioner's allegations concerning the extent of Whitney's misunderstanding of the defense of extreme emotional disturbance and petitioner's admission of the elements of burglary while testifying in an attempt to support such defense are not borne out by the record petitioner's allegation that he was prejudiced by Whitney's alleged failure to explore the possibility of a plea bargain due to his misunderstanding of the defense of extreme emotional distress is also without merit because, had the jury believed petitioner's testimony, it would have found him guilty only of manslaughter and assault and he could not have hoped for a more favorable outcome through a plea agreement. Accordingly, Whitney's misunderstanding of the defense of extreme emotional disturbance did not render his assistance deficient for purposes of the Sixth Amendment and this Court finds that on the record as a whole, petitioner received effective assistance of counsel.

Petitioner's second claim is that he received ineffective assistance of counsel because of Whitney's alleged conflict of interest. Pet. at ¶¶13, 15-19, 29. Judge Schroeder recommended that this claim be denied because petitioner

> "has failed to demonstrate any *** divergence between his interests and those of his attorney. The fact that his attorney was charged with obstruction of governmental administration[8] could

8. The R&R stated that this "charge arose out of [Whitney's] verbal conduct when [petitioner] was arrested, and was dismissed." R&R at 14 n.20. The R&R appears to have credited Whitney's account of the reason for his arrest — Whitney Nov. 30, 1987 Aff. at ¶¶10-11

(Cont'd)

> have no bearing on his conduct as plaintiff's counsel, and, even if [petitioner's] allegations concerning his attorney's advice and conduct about the knife and clothing were true, they do not support a finding that his attorney's interest and conduct were in conflict with a plausible line of defense or attach on the prosecution's case or in any way diverged from [petitioner's] interests." R&R at 16.

Petitioner objects to such portion of the R&R on the basis that Judge Schroeder should have found that Whitney had a conflict of interest or, alternatively, conducted an evidentiary hearing into such. Objections at 2, 7-9. There is no evidence tending to establish that Whitney had had a conflict of interest which had affected his representation of petitioner; petitioner did not even raise such allegations until almost five years after he had been convicted and sentenced and, inasmuch as the trial court — which had had the opportunity to judge petitioner's credibility — did not find an evidentiary hearing to be warranted based upon petitioner's allegations, this Court does not either.

Accordingly, it is hereby *ORDERED* that petitioner's objections to the R&R are overruled, that the R&R is adopted,

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(Cont'd)

—; however, the prosecution stated that Whitney had been arrested for interfering with the physical arrest of petitioner — Tantillo July 18, 1994 Aff. at ¶8 — and it appears that the charges against Whitney were not dismissed but were still pending during petitioner's trial — Tantillo July 18, 1994 Aff. Ex A. (Mar. 2, 1988 Letter from Whitney to Judge Dwyer) — and that Whitney was later tried on such charges. *See supra*, footnote 3.

that the petition is dismissed, that petitioner is granted a certificate of appealability solely on his conflict of interest claim and that this case shall be closed in this Court.

DATED: Buffalo, N.Y
May 29, 2002

s/ John T. Elfvin
JOHN T. ELFVIN
S.U.S.D.J.